

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

A.J. MYERS AND SONS, INC.,

Case No. 06-CA-119505

and

AMALGAMATED TRANSIT UNION, LOCAL 1738,
AFL-CIO, CLC

**RESPONDENT A.J. MYERS AND SONS, INC.'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE OCTOBER 3, 2014 DECISION OF ALJ DAVID I. GOLDMAN**

Filed on Behalf of A.J. Myers and Sons, Inc.

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TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE CASE	1
A. The First Student Bargaining Unit Covered Multiple Locations From Which Union Members Serviced Multiple School Districts	2
B. A.J. Myers' Central Operations From Kittanning	4
C. A.J. Myers Successfully Bids For The Latrobe School District Busing Contract	6
D. The Union Demands Recognition As The Bargaining Representative	8
II. QUESTIONS PRESENTED	9
III. ARGUMENTS	9
A. A.J. Myers Is Not A <i>Burns</i> Successor To First Student	10
B. Drivers At A.J. Myers' Six Terminals Share A Community Of Interest Making The Latrobe Terminal An Appropriate Bargaining Unit	17
1. The Kittanning Office Has Central Control Over The Other Terminals.....	18
2. All Operators Share A Common Skill Set and Working Conditions	21
3. There Is A High Degree Of Operator Interchange Among The Terminals	22
4. The Distance Between Facilities Is Not Unique Considering The Industry	23
5. There Is No Bargaining History At Any A.J. Myers Location	24
IV. CONCLUSION.....	25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>Advocate South Suburban Hospital v. N.L.R.B.</i> , 468 F.3d 1038 (7th Cir. 2006)	9
<i>AGS Services, Inc.</i> , 2004 WL 1824376 (NLRB 2004)	17, 18, 20, 23
<i>Atlantic Technical Services Corp.</i> , 202 NLRB 169 (1973)	15
<i>Baker Machining, Inc. v. P.A.C.E. 6-077, Paper, Allied-Industrial, Chemical, and Energy Workers International Union, AFL-CIO</i> , 2002 WL 1723723 (NLRB Div. of Judges 2002)	11
<i>Brusco Tug & Barge Co. v. N.L.R.B.</i> , 247 F.3d 273 (D.C. Cir. 2001)	16
<i>Dayton Transp. Corp.</i> , 270 NLRB 1114 (1984)	22
<i>Fall River Dyeing & Finishing Corp. v. N.L.R.B.</i> 482 U.S. 27, 107 S.Ct. 2225 (1987)	10, 11
<i>Laboratory Corp. of America Holdings</i> , 341 NLRB 1079	24
<i>Lincoln Private Police, as Successor to Industrial Security Guards, Inc.</i> 189 NLRB 717 (1971)	14
<i>Montauk Bus Co.</i> , 324 NLRB 1128 (1997)	15
<i>N.L.R.B. v. Boston Needham Industrial Cleaning Co., Inc.</i> , 526 F.2d 74 (1st Cir. 1975)	11
<i>N.L.R.B. v. Burns Int'l. Security Services, Inc.</i> , 406 U.S. 272, 92 S.Ct. 1571 (1972)	1 n.1, 9-10, 10 n. 9, 11
<i>N.L.R.B. v. Van Lear Equipment, Inc.</i> , 336 NLRB 1059 (2001)	15
<i>New Britain Transportation Co.</i> , 330 NLRB 397 (1999)	22-23
<i>Nova Services Co.</i> , 213 NLRB 95, 1974 WL 5371 (1974)	14-15
<i>Orkin Exterminating Co., Inc.</i> , 258 NLRB 773 (1981)	18, 19, 21, 22, 24
<i>Roman Catholic Diocese of Brooklyn</i> , 222 NLRB 1052 (1976)	16
<i>The Bronx Health Plan</i> , 326 NLRB 68 (1998)	15-16
<i>Trane, an Operating Unit of American Standard Companies</i>	

339 NLRB 866 (2003)	17-18, 21, 22, 23, 24
<i>Simon DeBartelo Group</i> , 325 NLRB 1154 (1998)	16
<i>Waste Management of Washington, Inc. d/b/a Waste Management Northwest</i> 331 NLRB 165 (2000)	23
<i>We Care Transportation, LLC</i> , 535 NLRB 65 (2008)	18, 19, 21, 22, 23, 24
<u>Statutes</u>	
29 U.S.C. § 159 (a)	10 n. 8

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Respondent A.J. Myers and Sons, Inc. ("A.J. Myers"), through its attorneys, files this Brief in Support of its Exceptions to the October 3, 2014, Decision (the "Decision") of ALJ David I. Goldman (the "ALJ") in which the ALJ found that A.J. Myers violated Sections 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to recognize and bargain with Petitioner Amalgamated Transit Union Local 1738, AFL-CIO, CLC (the "Union").

I. STATEMENT OF THE CASE

These exceptions address the ALJ's erroneous findings that A.J. Myers is a "*Burns* successor"¹ to its competitor, First Student Inc. ("First Student"), and that its single terminal location is an appropriate bargaining unit from which A.J. Myers has a duty to bargain with the Union. It is undisputed that A.J. Myers obtained a single contract that First Student formerly serviced from its still-operational Latrobe terminal. There was no evidence as to how many former First Student drivers that A.J. Myers hired actually serviced that contract, and the evidence as a whole does not support the ALJ's finding that there is a "substantial continuity" between employers for those drivers. The ALJ also erred in finding that A.J. Myers' Latrobe terminal alone is an appropriate bargaining unit.

¹ A *Burns* successor refers to the holding in *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 92 S.Ct. 1571 (1972).

A. The First Student Bargaining Unit Covered Multiple Locations From Which Union Members Serviced Multiple School Districts

First Student contracted to provide student transportation services to the Greater Latrobe Area School District (“Latrobe School District”) for a number of years until about July 1, 2013. (See Stipulations (“Stip.”) No. 1). Latrobe School District awarded A.J. Myers the public school portion of the transportation contract in November, 2012. (Stip. No. 3). Because a majority of the drivers that A.J. Myers hired to service the contract previously worked for First Student (but did not necessarily drive for Latrobe), the Union demanded that A.J. Myers recognize it as the bargaining representative of A.J. Myers’ Latrobe-based drivers. When A.J. Myers refused, the Union filed the charge that served as the basis of the General Counsel’s Complaint.

The Union is the bargaining agent for operators employed by three different employers: National Express Transit, First Student, and Town & Country Transit. (See Transcript of Hearing held July 23, 2014 (“Tr.”) at 22-23).² The Union has represented operators at First Student since approximately 1997, and was party to a Collective Bargaining Agreement (the “CBA”) with First Student for the period ending August 14, 2013. (*Id.* at 23-24).

The CBA covered First Student operators “performing services at the Latrobe facility ... or any other facility which may be used as replacement facility for the Greensburg or Latrobe facility.” (G.C. Ex. 2 at 1.) This was consistent with (and the CBA itself referenced to) the Certification of Representation dated March 11, 1996, wherein the NLRB certified the Union as the exclusive bargaining representative consisting of a unit of:

[a]ll full-time and regular part-time bus employees, spare bus employees, van drivers, spare van drivers and monitors employed by the

² David Merrill testified concerning the Union’s history as bargaining agent for operators who work at First Student. Mr. Merrill works for National Transit Corporation as an operator who has been a rank and file Union member since 2009, and is presently the President/Business Agent of Local 1738. (*Id.*)

Employer at its 1010 Clearview Drive, Latrobe, Pennsylvania, and its Peters Road, Greensburg, Pennsylvania facilities; excluding all mechanics, maintenance employees, dispatchers, office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

(Stip. No. 33; Jt. Ex. 2) (emphasis added). Mr. Merrill confirmed that the First Student bargaining unit included operators at three different First Student terminals up to the point when First Student lost the Latrobe School District contract; it covered employees driving at locations in Latrobe, Greensburg, and Jeanette. (Tr. at 33-34).

From those three locations, First Student (and Union operators within the bargaining unit) serviced contracts for Latrobe School District, Greensburg-Salem School District, Jeannette School District, and “some special needs programs,” which Mr. Merrill approximated numbered “five to eight” since 2009. (*Id.* at 35-36). Within those school district contracts, First Student (and Union operators) further provided services for special needs programs (*e.g.*, a school for the blind). (*Id.* at 36). From the Union’s perspective in terms of seniority and rosters, all of the school districts that First Student serviced are “combined as one,” and First Student employed “150-something” Union drivers to service its contracts. (*Id.* at 37-38).

A former Union representative who now works for A.J. Myers, Ms. Wendy Showers, explained how Union drivers employed by First Student out of the Latrobe terminal drove for multiple school districts.³ In her nine years at First Student, she drove for Greensburg-Salem School District, Seton Hill University, and Latrobe School District, all from the First Student Latrobe terminal. (*Id.* at 53-54). In addition to the districts Ms. Showers drove for, First Student drivers could bid on runs at Jeannette and other jobs available through the contracts that First Student had with the school districts, including an Intermediary Unit (IU), Ligonier Valley, the

³ Ms. Showers began working for A.J. Myers on August 20, 2013. (*Id.* at 52). She was the Union’s financial secretary from September, 2012, to August, 2013. (*Id.* at 55).

“ARC,” other “little ones here and there,” and “more van runs and stuff.” (*Id.* at 63-64). Important to this dispute, First Student drivers who reported to the Latrobe terminal did not necessarily drive for the Latrobe School District. (*Id.* at 64).

At First Student, drivers “change [their] runs every year,” and runs are chosen according to seniority. (*Id.* at 62). Ms. Showers picked her route every year. (*Id.* at 65). It was a common experience among First Student drivers to bid on jobs for different routes in any given year, and Ms. Showers herself was both displaced from her routes by other drivers and displaced other drivers from their routes through this bid process. (*Id.*) First Student drivers who drove for Latrobe School District could also drive charter jobs for other districts if drivers for those districts did not fill the charter spots available for their district on any given day. (*Id.* at 66).

The only other Union member to testify was Margaret Demine, although she did not testify that she actually drove for the Latrobe School District. (*Id.* at 78.) Ms. Demine confirmed that from the Latrobe terminal First Student transports students from Greensburg-Salem school district, Jeanette City Schools, Greensburg Central Catholic, and Seton Hill College *in addition to* transporting students from Greater Latrobe when it had that contract. (*Id.* at 76-77).

B. A.J. Myers’ central operations from Kittanning

A.J. Myers was founded in 1950 and operates a central office in Kittanning, Pennsylvania. (Testimony of William Myers, Tr. at 106-107). It is a family-owned business in its second-generation of ownership and management that contracts with school districts to provide student transportation and intermediate unit or charter trips required by the districts. (Tr. at 82-

83).⁴ A.J. Myers operates six terminals: Export, Kittanning, Mars, Harmony, Turtle Creek, and Latrobe. (Tr. at 83).

A.J. Myers' principal owners direct all company communications to the terminal locations through the Kittanning office. (Tr. at 109-110). Company personnel decisions, including hiring and firing, and establishing company policies all originate out of the Kittanning office. (*Id.* at 110-11). Company records for all terminals are kept in Kittanning. (*Id.* at 111). Although each terminal has a terminal manager, the managers do not have authority to bind A.J. Myers to contracts, and have no ability to set A.J. Myers policies. (*Id.*) All policies are set by upper management out of Kittanning. (*Id.*)

A.J. Myers runs payroll for each terminal location through the Kittanning office. (Tr. at 111). Mr. Myers is responsible for making all deposits necessary to cover payroll for each location. (*Id.*) Budgeting for the entire company comes from the Kittanning office. (*Id.* at 106). All revenue is directed into "one pot," from which the Kittanning office pays all bills, payroll, insurance, parts, and anything of that nature. (*Id.* at 107). The Kittanning office oversees all purchasing done by the terminals, and handles the insurance needs for each terminal. (*Id.* at 112).

A.J. Myers regularly directs drivers who operate out of one terminal to cover assignments at other terminals as needed to maintain high customer service. A.J. Myers' management directs its terminal managers to coordinate among themselves if they need drivers to cover their routes. (*Id.* at 110). Mr. Myers explained that all terminals are to "work as a team" because "it's all under one family, so whatever needs to work to cover at any given terminal, that's how we handle it." (*Id.* at 113). In the first year after the Latrobe terminal opened, A.J. Myers had over

⁴ Bill Myers, Dave Myers, Jim Myers, and Tim Myers own equal parts of A.J. Myers. (*Id.*) The Myers family also owns Myers Coach Lines, a separate entity that operates motor coaches through its own fleet of drivers. (*Id.* at 108).

1,000 trips where drivers drove for a terminal other than the terminal to which they reported, including:

- Drivers from the Latrobe terminal drove for other A.J. Myers terminals 10 times (*Id.* at 114; Resp. Ex. 1).
- Drivers from the Latrobe terminal drove for Myers Coach Lines 20 times (*Id.* at 116-117; Resp. Ex. 2).
- Drivers from the Turtle Creek terminal drove for the Latrobe terminal 10 times (*Id.* at 118; Resp. Ex. 3).
- Drivers from the Export terminal drove for Latrobe 3 times (*Id.* at 122-123; Resp. Ex. 4).
- Drivers from the Mars terminal drove for other A.J. Myers terminals 59 times, and other A.J. Myers' terminals drove for the Mars terminal an additional 20 times (*Id.* at 124-125; Resp. Ex. 5).
- Six drivers from three other A.J. Myers' terminals drove for the Seneca Valley terminal approximately 1,062 times (*Id.* at 126-128).⁵
- Drivers from other A.J. Myers' terminals either drove for the Kittanning terminal, or Kittanning drivers drove for other A.J. Myers' locations 36 times (*Id.* at 132-133; Resp. Ex. 7).

Drivers are paid their usual rate even when driving for another terminal. A.J. Myers does not charge back costs incurred by one terminal to another for driver sharing. (Tr. at 161).

C. A.J. Myers Successfully Bids for the Latrobe School District Busing Contract

The Latrobe terminal is A.J. Myers' newest location. (*Id.* at 84.) After receiving a Request For Proposal from the Latrobe School District, A.J. Myers submitted a proposal to provide student transportation service beginning with the 2013-2014 school year. (Stip. No. 3). The scope of the RFP that A.J. Myers responded to did not include special needs services or private school or parochial school transportation. (Tr. at 140). In November 2012, Latrobe School District notified A.J. Myers that it was the successful bidder and was awarded the

⁵ Although the ALJ sustained the General Counsel's objection to the Seneca Valley terminal records evidencing these trips (Resp. Ex. 6) counsel admitted that she had "no way to dispute" Mr. Myers' testimony that these instances of driver sharing among terminals in fact occurred. (Tr. at 129). Six A.J. Myers' drivers from three different terminals covered six routes on a daily basis because Seneca Valley was short on drivers. (Tr. at 126). Because there are approximately 177 school days in a given school year, Mr. Myers used simple math to approximate the instances of driver-sharing, which was not contradicted by the General Counsel.

contract. (Stip. No. 3). Effective July 1, 2013, A.J. Myers entered into a seven-year contract with Latrobe School District to provide transportation services formerly provided by First Student. (Stip. No. 4).

To prepare to service this new contract, A.J. Myers ordered additional buses and looked for a new facility. (Tr. at 140.) In August, 2013, A.J. Myers purchased real property to open a bus terminal in Latrobe. (Stip. No. 5). A.J. Myers did not take over the facility that First Student used to service the contract, and did not purchase any buses from First Student. (Tr. at 141.) A.J. Myers hired Tom Oleyar to serve as Terminal Manager at Latrobe, and Michelle Murphy to serve as the Assistant Terminal Manager. (Stip. Nos. 16; 22). Although Mr. Oleyar and Ms. Murphy previously worked for First Student, they did not hold management positions there and were hired by A.J. Myers to fill different positions than what they held with First Student. (Tr. at 97-98).⁶ Mr. Oleyar reports directly to A.J. Myers' President David A. Myers, Vice-President James Myers and Secretary/Treasurer William L. Myers. (Stip. No. 17).

To hire drivers, A.J. Myers dropped off applications at the school at the request of the Latrobe school transportation director. (Tr. at 142). As of about August 19, 2013, A.J. Myers hired nearly all of the employees that it would need to service its contract with the Latrobe School District, including supervisors, bus operators and mechanics. (Stip. No. 7). All but one of the 52 drivers that A.J. Myers hired to staff the Latrobe terminal as of August 19, 2013, previously worked for First Student during the 2012-2013 school year. (Jt. Ex. 3; Stip. No. 9).

The drivers that A.J. Myers hired to service the Latrobe School District contract are subject to the same terms and conditions as employees at other A.J. Myers' terminals, including discipline policies, benefits, management structure, scheduling requirements, drug testing, and

⁶ Tom Oleyar was employed by First Student as a dispatcher until July, 2013. (Stip. No. 15). Michelle Murphy was employed by First Student as a driver/trainer. (Stip. No. 20).

safety policies. (Tr. at 143-144.) Drivers at all of A.J. Myers' terminal locations, including Latrobe, track their daily hours by completing daily time cards. (Stip. No. 37).

D. The Union Demands Recognition as the Bargaining Representative

Through letters dated November 25, 2013, the Union requested that A.J. Myers recognize the Union as the operators' bargaining representative. (Tr. at 27). When A.J. Myers received these letters, Bill Myers tried to contact the Union via telephone. Because there is no telephone number for the Union on the letter, Mr. Myers located a phone number on the internet and tried (without success) to contact the Union over a period of days. (*Id.* at 93-94). Ultimately, Mr. Myers determined that A.J. Myers was not obligated to recognize the Union because former Union operators did not make up a majority of the operators that A.J. Myers employed in Westmoreland County as he interpreted the request. (Tr. at 144).⁷

On December 23, 2013, the Union filed a charge claiming A.J. Myers failed to bargain collectively with the Union. (G.C. Ex. 1(a)). On April 30, 2014, the NLRB filed a Complaint alleging A.J. Myers violated Sections 8(a)(1) and (5) of the Act when it refused to recognize and bargain with the Union. The parties presented live testimony before the ALJ at a hearing held on July 23, 2014, and submitted post-hearing briefs.

The ALJ issued the Decision on October 3, 2014. On the issue of successorship, the ALJ found there was "substantial continuity" between First Student's and A.J. Myers's operations

⁷ A.J. Myers disputed the scope and effectiveness of the Union's demand, which sought recognition as the representative of "all full-time and regular part-time bus operators, park outs and monitors *providing transit services in and about Westmoreland, Pennsylvania* who are employed by A.J. Myers and Sons Transportation" (G.C. Ex. 3). Despite the Union's confusing wording, the ALJ found the request was limited to seeking recognition of the Latrobe terminal drivers only, making November, 25, 2013, the effect date of the request to bargain. Although A.J. Myers does challenge the ALJ's conclusions that it is a *Burns* successor and that the Latrobe terminal is an appropriate bargaining unit, it does not challenge the ALJ's finding that the November 25 letter was a demand to bargain with Latrobe based operators alone.

such that A.J. Myers assumed a duty to bargain with the Union when it obtained the Latrobe School District contract. The ALJ also found that A.J. Myers' Latrobe terminal is an appropriate bargaining unit whose employees do not share a community of interests with drivers at other terminal locations. Based on these findings, the ALJ held that A.J. Myers violated Sections 8(a)(1) and (5) of the Act when it refused to bargain with the Union. These exceptions followed.

II. QUESTIONS PRESENTED

1. Is there substantial evidence to support the ALJ's finding that A.J. Myers is a successor employer to First Student where A.J. Myers only obtained one third-party contract serviced by First Student and there was no evidence presented as to how many of the former First Student employees hired by A.J. Myers actually drove for the Latrobe School District? (Question relates to Exception No. 1).

2. Did the ALJ err in finding that A.J. Myers' Latrobe facility is an appropriate bargaining unit where A.J. Myers operates six terminals and its employees share a community of interests? (Question relates to Exception No. 2).

III. ARGUMENTS

The Board is not bound by the ALJ's findings and conclusions, and is free to draw its own inferences as well as conclusions when its broader experience and expertise is applicable. *Burns International Security Services, Inc. v. N.L.R.B.*, 567 F.2d 945, 948 (10th Cir. 1977). The Board is entitled to make its own factual findings, independent of and potentially contrary to the ALJ. *Advocate South Suburban Hospital v. N.L.R.B.*, 468 F.3d 1038 (7th Cir. 2006). Here, the

evidence does not support the ALJ's recommendation that A.J. Myers violated Sections 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain collectively with the Union.⁸

A. A.J. Myers Is Not A Burns Successor To First Student

The ALJ first recommends finding that A.J. Myers is a successor employer to First Student because a majority of drivers that A.J. Myers hired to staff its Latrobe terminal were formerly employed by First Student and were members of a bargaining unit represented by the Union. In finding that there was "substantial continuity" of employment for the First Student drivers that A.J. Myers hired, the ALJ ignored the fact that the General Counsel presented no evidence of how many First Student drivers ever drove for the Latrobe School District, and gave no weight to undisputed evidence on other factors that militate against a finding of successorship.

To qualify as a *Burns* successor, the bargaining unit must remain unchanged and the new employer must hire a majority of employees who are represented by a certified bargaining agent. *N.L.R.B. v. Burns Int'l. Security Services, Inc.*, 406 U.S. 272, 92 S.Ct. 1571 (1972).⁹ An employer is only required to recognize a union representing the predecessor's employees where: (1) there is a "substantial continuity" between the predecessor's and the employer's operations; and (2) a majority of the new employer's workforce, in an appropriate unit, consists of the predecessor's employees. *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 107

⁸ Section 8(5) makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees," subject to the provisions of § 159(a). 29 U.S.C. § 158(a)(5). Section 159(a) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining" 29 U.S.C. § 159(a).

⁹ The Supreme Court recognized "[i]t would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one." *Id.* at 281, 1579. "But where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent," the Court affirmed the successor finding based on those facts. *Id.* (emphasis added).

S.Ct. 2225 (1987). “Substantial continuity” is assessed from the employee’s perspective and determines if the employees view their job as essentially unaltered. Relevant factors include whether the business of both employers is the same, employees are doing the same jobs in the same working conditions under the same supervisors, and whether the new employer has the same processes and the same body of customers. *Id.*

The question of successorship is “primarily factual in nature and is based on the totality of the circumstances of a given situation.” *Fall River Dyeing* at 43. Because the analysis is fact dependent, there is no formulaic approach and each situation must be analyzed on its own facts. *See, e.g., Burns*, 406 U.S. at 279 (stating “[r]esolution turns to great extent on the precise facts involved here”); *N.L.R.B. v. Boston Needham Industrial Cleaning Co., Inc.*, 526 F.2d 74, 75 (1st Cir. 1975) (describing successorship as being “shrouded in somewhat impressionist approaches” for which courts “have been reluctant to enunciate very broad principles in this area, preferring a more ad hoc approach”); *Baker Machining, Inc. v. P.A.C.E. 6-077, Paper, Allied-Industrial, Chemical, and Energy Workers International Union, AFL-CIO*, 2002 WL 1723723 (N.L.R.B. Div. of Judges 2002) (stating a “too formulistic approach [to successorship] ignores the underlying substance of the case law as expressed in *Burns* and its progeny.”)

The ALJ’s conclusion that “[b]y all evidence, the [former First Student] employees are doing the same job” at A.J. Myers (Dec. at 12), takes a far too superficial approach to the facts. The ALJ found the employees “drive school buses both to and from school for the Latrobe school district,” but there no evidence presented as to how many A.J. Myers’ operators drove for Latrobe school district while employed at First Student. The Union’s bargaining unit covered three First Student locations (Latrobe, Greensburg, and Jeannette), from which First Student staffed contracts for no less than three different school districts, one university, up to eight

special needs programs, and other programs that were subsets of First Student's contracts with the school districts.¹⁰ The General Counsel did not submit any evidence as to how many of the former First Student drivers that A.J. Myers hired *actually drove for the Latrobe School District*. The "roster" of employees (Jt. Ex. No. 3) merely provides that the drivers were employed by First Student, but does identify what district they drove for while so employed.

If the ALJ inferred that all of the drivers that A.J. Myers hired drove for Latrobe school district, the evidence does not support such inference. Mr. Merrill admitted that the Union "combined as one" all of the drivers in the bargaining unit for purposes of determining seniority lists, and could not break down how many members drove for Latrobe compared to other First Student contracts. (Tr. at 37). Ms. Showers testified that at First Student, drivers "change your run every year," and unit members had options of what district they drove for based on seniority. (*Id.* at 62; 64).¹¹ Ms. Showers admitted that First Student drivers who reported to the Latrobe terminal did not necessarily drive for the Latrobe School District. (*Id.* at 64). The Union had over 150 members in the bargaining unit (before First Student lost the Latrobe School District) to service these multiple contracts. (Tr. at 38). As of August 19, 2013, A.J. Myers only hired 51 of these drivers (Jt. Ex. 3; Stip. No. 9).

On the issue of whether the First Student drivers' jobs were "essentially unaltered" when they came to work for A.J. Myers, the ALJ acknowledged there was no continuity with regard to the management to whom they reported, the location of where the drivers report to work, or the

¹⁰ See Tr. at 33-36 (testimony of David Merrill identifying First Student terminal locations where the bargaining unit reported and the districts and programs for which First Student had contracts to provide transportation it staffed with operators from the bargaining unit).

¹¹ In the nine years that Ms. Showers drove for First Student, she had regular runs driving for Greensburg-Salem, Seton Hill University, and Latrobe School District, which "changed from year to year." (Tr. at 54).

equipment on which the driver work. (Dec. at 12, stating “it is true” that drivers “drive a different model of bus,” “work out of a terminal located 2.6 miles from [First Student],” and “supervision has changed”).¹² Even though *Fall River Dyeing* instructs that these are among the very factors that determine whether there is “substantial continuity” between employers, the ALJ apparently gave no weight whatsoever to these undisputed facts. In doing so, the ALJ did not analyze the “totality of the circumstances” on successorship as *Fall River Dyeing* directs.

Regarding working conditions, the former First Student drivers who now work for A.J. Myers have job security in terms of their assignment that they did not have at First Student. A.J. Myers hired them specifically to drive for the Latrobe School District. Drivers from other terminals cannot bump them off of their Latrobe routes based on seniority and relegate them to driving for other districts as was the case at First Student. The ALJ did not even comment on this factor in his Decision.

Finally, A.J. Myers only obtained one of many First Student contracts serviced by the bargaining unit, and even then did not take over all of the contract work that First Student had with Latrobe School District. A.J. Myers did not bid on, and did not receive, the special needs programs or parochial school busing portion of the Latrobe School District contract. (Tr. at 98-99; 140). First Student continues to operate its Latrobe facility and service the remaining contracts it has with other school districts, local universities, and special needs programs.

¹² The evidence on these points was uncontested. Regarding management, drivers at the First Student Latrobe terminal reported to Mark Dominick (terminal manager) and Dee Dee Lape (assistant terminal manager), and now report to Tom Oleyar as terminal manager and Michelle Murphy as assistant terminal manager. (Tr. at 97-98). A.J. Myers opened a new terminal in Latrobe once it was awarded the contract. There was no dispute that A.J. Myers operates its own bus equipment, meaning the drivers are not using the same equipment they previously used at First Student.

On similar facts, the Board has held that successorship does not exist where an employer assumes only part of a predecessor's business that had staffed multiple contracts from a larger bargaining unit (as opposed to a single-location unit). *Lincoln Private Police, as Successor to Industrial Security Guards, Inc.*, 189 NLRB 717 (1971). There, the respondent (Lincoln) secured contracts to provide guard services previously provided by a competitor (Industrial) whose employees were represented by a union. The certified bargaining unit included all guards that Industrial employed "in the San Juan Metropolitan area," from which Industrial staffed over 60 accounts. *Id.* at 718. The union claimed that Lincoln was obligated to bargain with it after Lincoln hired 66 former Industrial guards to service 26 former-Industrial accounts.

The Board disagreed, and held Lincoln was not a successor to Industrial because there was no "substantial continuity" between Lincoln and Industrial. *Id.* at 719. Rather, there was a "substantial and material alteration in the employing enterprise" where Lincoln did not purchase any of Industrial's assets or property, Lincoln had accounts other than former Industrial jobs, Lincoln supplied its employees with different uniforms, vehicles and equipment, Lincoln occupied a different location than Industrial, and there was no carryover of supervisory personnel from Industrial to Lincoln. *Id.* The Board found *Burns* was "clearly distinguishable" because the union in *Lincoln* represented Industrial employees at multiple locations, and the accounts that Lincoln secured were encompassed within Industrial's employing enterprise compared to *Burns* single location account. *Id.*

There is no successor where an employer takes over but one of many contracts from a predecessor that staffs its contracts from a larger bargaining unit that serves more than one location. *Nova Services Co.*, 213 NLRB 95, 1974 WL 5371 (1974). In *Nova*, a janitorial company (Nova) was awarded cleaning contracts from Mechanics National Bank that were

previously serviced by Sanitas Services (Sanitas). Sanitas had over 300 employees who were represented by a bargaining unit that consisted of all employees engaged in the contract building industry in the state. *Id.* at 96. Of the ten employees that Nova used to service the contract, eight were former Sanitas employees who were union members. *Id.* at 97. The union claimed that Nova was a successor to Sanitas and filed a charge that Nova refused to bargain with the union.

Although the union's position had "surface appeal," the Board found that a "narrow perspective is not enough" and affirmed the ALJ's finding that Nova was not a successor to Sanitas. *Id.* The Board held there was no substantial continuity between employers because Sanitas remained in operation and Nova only took over a portion of Sanitas' operations. *Id.* Notably, the Board held that the mere fact that part of Nova's business "was duplicative of a portion of one project which Sanitas had previously performed does not warrant the conclusion that there has been a substantial continuity in the employing enterprise." *Id.* See also, *Atlantic Technical Services Corp.*, 202 NLRB 169, 170 (1973) (reversing finding of successor status where respondent hired but a portion of the larger-bargaining unit that provided variety of services to former employer).

The ALJ referred to these cases as "misleading outliers," and instead cited cases where successorship was found even though the new employer obtained "just a portion of a predecessor's business." (Dec. at 13). Those cases are factually distinguishable because, unlike here, the employees hired actually worked at the operation that the new employer obtained. See *N.L.R.B. v. Van Lear Equipment, Inc.*, 336 NLRB 1059 (2001) (finding successorship where employer hired 19 drivers from single location, single contract entity); *Montauk Bus Co.*, 324 NLRB 1128 (1997) (finding successorship based in part on parties' stipulation that drivers hired from the former employer drove buses for the same school district); *The Bronx Health Plan*, 326

NLRB 68 (1998) (finding successorship where clerical employees continued to work at the same hospital where they worked for previous employer); *Simon DeBartelo Group*, 325 NLRB 1154 (1998) (finding successorship where mall operator hired four HVAC workers who previously worked at the same mall); *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976) (finding successorship where 49 of 55 teachers hired worked at the same school when employed by previous employer). Successorship existed in part because the new employer hired the same workers to service the same location or body of customers - the General Counsel did not present evidence that such was the case here.

Although the ALJ suggests that *Lincoln Private Police*, *Nova Services*, and *Atlantic Technical Services* should be overturned because in his view “it has been many years since these cases accurately represented Board policy on successorship” (Dec. at 13), the Board has not overruled these decisions and they retain their precedential value. A decision’s age does not impact its precedential value when it is on point. See *Brusco Tug & Barge Co. v. N.L.R.B.*, 247 F.3d 273, 277 (D.C. Cir. 2001) (refusing enforcement and remanding with instructions to explain why two cases that were “on point” yet were decided nearly forty years earlier should not be applied). This particularly true where the issue, like the issue of successorship at bar, is so factually dependent and can turn on the existence or absence of a number of factors. As such, A.J. Myers submits that this case is factually more analogous to *Lincoln Private Police* and *Nova Services* than the cases cited by the ALJ.

Considering, as the Board must, the “totality of the circumstances,” there is not substantial evidence in the record to support the ALJ’s finding that there was a “substantial continuity” in First Student’s “employing enterprise” simply because A.J. Myers now services the public school portion of the Latrobe School District contract. A.J. Myers should not be found

to be a successor employer to First Student where it only took over a portion of a single contract held by First Student, that contract is but one of many other contracts serviced by A.J. Myers' nearly 500 drivers, and there was no evidence of how many hired drivers actually drove for Latrobe when employed by First Student. A.J. Myers is not a *Burns* successor and should not be obligated to recognize the Union as the bargaining representative of its operators.

B. Drivers at A.J. Myers' Six Terminals Share a Community of Interest Making the Latrobe Terminal Alone an Inappropriate Bargaining Unit

After finding there was "substantial continuity" for the First Student employees that A.J. Myers hired, the ALJ found that A.J. Myer's Latrobe terminal alone is an appropriate bargaining unit with which A.J. Myers had to collectively bargain. These are separate issues, as one could be found to be a "successor" and still not be obligated to bargain if the alleged bargaining unit is inappropriate. *See, e.g., AGS Services, Inc.*, 2004 WL 1824376 (NLRB 2004) (finding single-unit was not an appropriate bargaining unit and dismissing claim despite finding respondent was a successor-employer). Here, drivers at all six A.J. Myers' terminal locations share a community of interest, and it is improper to designate the Latrobe terminal as an appropriate bargaining unit.

When determining an appropriate bargaining unit, the Board "is guided by the fundamental concept that only employees having a substantial mutuality of interest ... can be appropriately grouped into a single unit." *AGS Services, Inc.*, 2004 WL 1824376 (NLRB 2004). A single-facility unit is presumptively appropriate unless it has been effectively merged into a more comprehensive unit or is so functionally integrated that it has lost its separate identity. *Trane, an Operating Unit of American Standard Companies*, 339 NLRB 866, 867 (2003). The Board "has never held or suggested that to rebut the presumption a party must offer 'overwhelming evidence ... illustrating the complete submersion of the interests of employees at

the single store,’ nor is it necessary to show that the ‘separate interests’ of the employees sought have been ‘obliterated.’” *Id.*

The Board examines a number of “community of interest” factors to determine whether the single-facility presumption has been rebutted, including: (1) central control over daily operations and labor relations; (2) similarity of employee skills, functions, and working conditions; (3) the degree of employee interchange; (4) the distance between the locations; and (5) the bargaining history, if any exists. *Id.* The ALJ only analyzed factors 1 and 3 (Dec. at 16-18), and in doing so erred in finding that employees at all A.J. Myers’ locations do not share a community of interest making the Latrobe location alone an inappropriate bargaining unit.

1. The Kittanning Office Has Central Control Over The Other Terminals

An employer exhibits “central control” over other locations, making a single-location unit inappropriate, where, for example: (1) all decisions with respect to policies, procedures, hiring discipline and wages emanate from one location (*Trane*, 339 NLRB at 866); (2) employee pay records, personnel files and other administrative records are centrally maintained (*We Care Transportation, LLC*, 535 NLRB 65, 67 (2008)); (3) one office is responsible for multiple locations’ revenues, profits, leases, and equipment purchases; (*Orkin Exterminating Co., Inc.*, 258 NLRB 773 (1981)); (4) ultimate supervision and company decisions, including hiring and firing, are from a central location. *AGS Services, Inc.*, 2004 WL 1824376 (NLRB 2004).

The record evidence, which was uncontested, established that all of those factors are present here. Mr. Myers testified that company personnel decisions, including hiring and firing and establishing company policies, all originate out of the Kittanning office. (Tr. at 110-11). Company records for all terminals are kept in Kittanning. (*Id.* at 111). Although each terminal has a terminal manager, the managers do not have authority to bind A.J. Myers to contracts, and

have no ability to set A.J. Myers policies. (*Id.*) All policies are set by upper management out of Kittanning. (*Id.*) A.J. Myers' owners direct all communications to the terminal locations through the Kittanning office. (Tr. at 109-110).

A.J. Myers runs payroll for each terminal location through the Kittanning office. (Tr. at 111). Mr. Myers is responsible for making all deposits necessary to cover payroll for each location. (*Id.*) Budgeting for the entire company comes from the Kittanning office. (*Id.* at 106). All revenue is directed into "one pot," from which the Kittanning office pays all bills, payroll, insurance, parts, and anything of that nature. (*Id.* at 107). The Kittanning office oversees all purchasing done by the local terminals, and handles the insurance needs for each terminal. (*Id.* at 112).

The ALJ acknowledged that the Kittanning office maintains central control over A.J. Myers' operations, but casually dismissed the evidence on this fact. (Dec. at 16, stating argument of central control was "true, as far as it goes.") The ALJ did not address much of the testimony cited above, which was keyed to the factors that the Board has always considered when determining the issue of central control. The ALJ concluded that because each terminal has its own manager there is no central control out of the Kittanning office. (Dec. at 16, stating the day-to-day operations is "vested" in the terminal manager, and terminals do their own payroll and purchasing of fleets and each terminal has its own wage scale). The evidence does not support this finding.

The fact that a location has its own manger is not conclusive on the issue of control or functional integration. *We Care Transportation, LLC*, 535 NLRB at 65 (finding single location presumption rebutted even though facility had a dispatcher and manager "who oversees the transfer station duties" where operations were centered from headquarters); *Orkin*, 258 NLRB at

774 (presumption rebutted even though seven offices had branch managers where central control was from district office). The ALJ cites Mr. Myers' stray comment that A.J. Myers' terminal managers "are given a lot of latitude" to prop up the argument that there is no central control of operations. (Dec. at 16.) Mr. Myers made that comment solely in the context of management's direction that terminal managers coordinate among themselves if they need drivers to cover their routes. (Tr. at 110). Terminal managers do not have any role or "latitude" in setting company policy, hiring or firing, entering contracts, or other issues that come from central management in Kittanning.

Regarding payroll, the testimony was that each terminal tracks payroll, but it is actually sent to the payroll company and funded through the Kittanning office. (Tr. 111-112). On purchasing, terminal managers have to submit purchase orders to the Kittanning office in order to purchase equipment for their fleets because the Kittanning office oversees purchasing. (Tr. at 112). Regarding wage scales, A.J. Myers pays its drivers based on geographical location of what the district pays. (Tr. at 155). An employer's paying different wage rates based on geography does not preclude a finding that a single-facility bargaining unit is improper. *See AGS Services, Inc.*, 2004 WL 1824376 (NLRB 2004) (finding single-facility unit inappropriate where difference in wage rates existed due to minimums issued by the GSA based on geography). The ALJ's conclusion that all of these operations are controlled at the terminal level has no support in the evidentiary record.

Without explaining why, the ALJ found it "significant" that an A.J. Myers' brochure listed its six terminal locations and identifies the managers and assistant managers for each location. (*Id.* at 17). This advertising piece says nothing about A.J. Myers' centralized management, and does not contradict Mr. Myers' testimony that the terminal managers do not set

company policy, do not make hiring and firing or other personnel decisions, and do not have the authority to bind the company to contracts. The ALJ's conclusion that A.J. Myers does not centralize control over its terminals from the Kittanning office is contrary to all record evidence.

2. All Operators Share A Common Skill Set And Working Conditions

If all employees in the proposed multi-location unit perform the same job functions, that factor supports a finding against a single-facility bargaining unit. *We Care*, 535 NLRB at 65 (truck drivers shared common skills and were all required to have a CDL class A driver's license); *Trane*, 339 NLRB at 867 (technicians who performed same job functions, same required qualifications, and worked on equipment shared common skills and working conditions); *Orkin*, 258 NLRB at 774 (technicians who shared job functions, used similar equipment, and adhered to same work rules shared a common skill and work conditions).

Here, it was uncontested that operators at all A.J. Myers' locations share a common skill set and working conditions. All employees of the proposed bargaining unit (whether a single or multiple location unit) are bus drivers responsible for daily student transportation. (Tr. at 112-113, describing daily duties). All drivers are required to have a Class B license with a P endorsement and an S endorsement. (Tr. at 148-149). All drivers are subject to the same policies, regardless of where they report to work, including policies on discipline, scheduling, drug testing, and safety. (Tr. at 143-144; 160). All drivers are subject to the same management structure and receive the same benefits, regardless of location. (Tr. at 143-144.) Drivers at all terminal locations track their daily hours by completing daily time cards. (Stip. No. 37).

The ALJ did not even address this element of the analysis, and it indisputably favors A.J. Myers' position. There is nothing unique about the Latrobe terminal drivers' working conditions

or skill set as compared to drivers at other terminals that would justify treating them as a single-location bargaining unit.

3. There Is A High Degree Of Operator Interchange Among The Terminals

A single-facility bargaining unit is not appropriate where there is employee interchange and functional integration among terminals. *See Orkin*, 258 NLRB at 774 (finding interchange of 20 technicians among seven location over a nine month period as “substantial”); *Trane*, 339 NLRB at 868 (finding testimony that cross-over occurred “hundreds of times a year” supported a finding that single-location unit was inappropriate); *Dayton Transp. Corp.*, 270 NLRB 1114 (1984) (finding 400-425 instances of interchange in a one year period supported rebutting the presumption); *We Care*, 535 NLRB at 67 (finding 450 instances of interchange supported a multi-terminal unit).

The evidence concerning driver interchange among the terminals was uncontested. Mr. Myers testified that it is a common daily occurrence among the terminals for them to request drivers from another terminal. (Tr. at 113). A.J. Myers’ management has a standing directive that terminal managers coordinate coverage among themselves when needed, and managers have the names and numbers of the other terminals available to them for this purpose. (*Id.* at 110). As summarized in § I(B), *supra*, in the first year after the Latrobe terminal opened A.J. Myers had over 1,000 trips where drivers drove for a terminal other than the terminal to which they reported. This evidence of substantial employee-interchange further supports a finding that all operators share a community of interests such that a single-facility unit is inappropriate.

The ALJ did not dispute the evidence, but apparently gave it no weight. Citing *New Britain Transportation Co.*, 330 NLRB 397 (1999), the ALJ concluded that the level of interchange among terminals was insignificant because it comprised less than one percent of all

trips made from the Latrobe terminal. (Dec. at 17). Mr. Myers could not approximate how the 1,000-plus trips that involved driver-sharing compared to the total number of trips drivers made during the school year, but Board has held that an employer can rebut the single-location presumption even with evidence of employee-interchange that is “general in nature” where the other factors are present. *Trane*, 339 NLRB at 868 (finding uncontested evidence of employee-interchange was sufficient to rebut single-facility presumption, even when it lacked specificity and “was not of the caliber required under *New Britain Transportation Co.*”; *Waste Management of Washington, Inc. d/b/a Waste Management Northwest*, 331 NLRB 165 (2000) (same).

The ALJ gave undue weight to this factor considering the substantial evidence supporting the other factors to rebut the presumptive appropriateness of a single location unit. *Id.* at 309 (reversing ALJ finding that single location unit was appropriate even where employer’s evidence of interchange was “minimal” where other factors supported a multi-location bargaining unit).

4. The Distance Between Facilities Is Not Unique Considering The Industry

The distance between the employer’s facilities is another factor in the analysis of what constitutes a proper bargaining unit. The Board has held that a single-facility bargaining unit is inappropriate even where the employer’s locations are over 100 miles apart. *Trane*, 339 NLRB at 867 (finding against single-location unit despite 108 miles between locations); *We Care*, 535 NLRB at 65 (2008) (finding against single-location unit despite 194 miles between locations because the nature of the transportation business renders this factor “less critical”). Moreover, “[w]here other important factors militate against a single-location unit, the Board does not give geography controlling significance.” *AGS Services, Inc.*, 2004 WL 1824376.

The average distance between the Kittanning facility and the other five terminals is only 31 miles.¹³ Considering the amount of driver-sharing that occurs, and the directive from management that terminals find coverage from other terminals as needed, the modest distance between terminals does not isolate drivers such that the terminals are not functionally integrated. This is particularly true because A.J. Myers has satisfied the other elements to rebut the single-location unit presumption. The ALJ did not address this element of the analysis, and it favors A.J. Myer's position.

5. There Is No Bargaining History At Any A.J. Myers Location

An absence of bargaining history at any single location supports a finding that a single-facility unit is inappropriate. *Laboratory Corp. of America Holdings*, 341 NLRB 1079, 1083 (rejecting proposed unit in part due to absence of bargaining history at unit); *Orkin*, 258 NLRB at 774 (single-facility presumption rebutted where there was no bargaining history at single location or broader unit); *Trane*, 339 NLRB at 867 (same); *We Care*, 535 NLRB at 66 (same).

Here, it is uncontested that A.J. Myers has no bargaining history at any of its locations. The ALJ did not address this factor in the Decision.

Considering the strong, and largely un rebutted, evidence of the community of interests shared by all A.J. Myers' operators in the six terminal locations, a single-location bargaining unit is inappropriate. When the proper, company-wide bargaining is considered, the Union does not represent a majority of A.J. Myers' operators and the Complaint should be dismissed.

¹³ Measurements were taken from the website <http://www.distancefromto.net>. The reported distances measured from Kittanning are: (1) Latrobe: 35 miles; (2) Mars: 27 miles; (3) Zelienople: 32 miles; (4) Turtle Creek: 33 miles; and (5) Export: 28 miles. The Board may take judicial notice of distances on a map.

IV. CONCLUSION

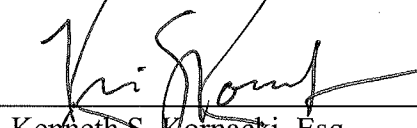
For the reasons set forth above, A.J. Myers and Sons, Inc. respectfully submits that the Board reverse the ALJ's findings and dismiss the Complaint.

Date: October 30, 2014

Respectfully submitted,

METZ LEWIS BRODMAN MUST O'KEEFE LLC

By

A handwritten signature in black ink, appearing to read "K. Kornacki", is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief In Support of Exceptions to the October 3, 2014 Decision of ALJ David I. Goldman was served on October 30, 2014, by United States mail, first class postage prepaid, at Pittsburgh, Pennsylvania:

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